85-957

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1985

PAUL H. VIGNES,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the fourteenth amendment to the United States Constitution require a trial court to instruct the jury on entrapment where substantial evidence of entrapment was introduced?

2. Did the trial court err in failing to find that the Government agent's actions violated the defendant's due process rights?

3. Does the due process clause require the Court to enforce a plea agreement entered into by the defendant and the Government when the Government seeks to withdraw from the agreement because of information which

it knew or should have know at the time of the agreement?

4. Where jurors are responsible for both reaching a verdict and fixing a sentence does the due process clause and the sixth amendment require the trial judge to explain jury polling to the jury in order to avoid confusion on the part of jurors?

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OPINIONS BELOW

The ruling of the Arlington County Circuit Court allowing the Commonwealth to withdraw its motion to nolle prosequi was issued on December 12, 1983, and is set forth in the Appendix at A- 3. The court's order reflecting the jury's finding of the defendant's guilt after trial was issued on March 8, 1984, and is set forth in the Appendix at A-6. The court's denial of the defendant's Motion to Set Aside the Verdict of the Jury was denied on June 4, 1984. See A-6. The Virginia Supreme Court denied the defendant's appeal on June 3, 1985. See A-12. A Petition to Rehear was denied on September 6, 1985. A-14.

JURISDICTION

The order of the Supreme Court of Virginia denying the defendant's appeal was issued on June 4, 1985. The denial of the defendant's Petition for Rehearing was entered on September 6, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

The petitioner, Paul H. Vignes, was indicted on March 21, 1983 for distribution of a controlled substance in violation of Va. Code Ann. § 18.2-248. Vignes, a journeyman plumber by trade with no previous criminal record, attended a benefit fund-raising event for the Multiple Sclerosis Society in Arlington County, Virginia, on October 24, 1982. While at this function he was introduced to Gregory Dutcher, an undercover police officer. Prior to this meeting, Vignes was unknown to Dutcher. After socializing with Vignes and others for several hours, Dutcher invited several persons including Vignes to go to his car. Dutcher supplied a white powdery substance and advised Vignes it was "crank" (metamphetamine). Dutcher also supplied all of the necessary paraphernalia

and prepared the substance for Vignes's use. This was the first occasion that Vignes has used an illicit drug. Thereafter, Vignes and Dutcher met socially over a 2 month period on a number of occasions. Dutcher made repeated requests for Vignes to get him some cocaine. Although Vignes initially refused to buy drugs for Dutcher, by playing on Vignes's sympathy Dutcher was finally able to convince Vignes to get him drugs. Dutcher told Vignes that his father had just had a heart attack and was seriously ill in New York, and that Dutcher needed the cocaine to make his visits to his sick father bearable. During the following four weeks, Vignes made 3 separate purchases of small amounts of cocaine which he then passed on to Dutcher at no profit. The distribution of controlled substances for which Vignes was arrested on November 18, 1982, in Arlington involved less

than one gram of cocaine. Vignes made a motion to dismiss the indictment for due process violations on October 18, 1983, at which time the federal issue presented in Argument I of this petition was raised. A-15. The motion was subsequently denied.

Prior to his trial, Vignes entered into a written plea agreement in which the Arlington County Prosecutor agreed to nolle prosequi the charge against Vignes in exchange for Vignes's meeting several conditions. A-17. On November 23, 1983, the Prosecutor's motion to nolle prosequi the indictment against the defendant was granted. On December 5, 1983, the Prosecutor moved to withdraw its motion to nolle prosequi, notwithstanding the plea agreement and its prior motion. Oral argument was heard, at which time the defendant raised the issue presented

in Argument II of this petition. A-20. Despite uncontradicted evidence that the Commonwealth Attorney's Office knew of the appeal, and that the Assistant Commonwealth's Attorney admitted that he had not checked the case file (which contained notice of the appeal) before entering into the agreement, A-21, the court ruled that the agreement need not be enforced. A-21. The Prosecutor based his motion to withdraw on the allegation that he was misled by the defendant's attorney regarding the finality of a companion case in Fairfax County. Had he known that the conviction in Fairfax County was being appealed, the prosecutor alleged, he would not have entered into the agreement. Vignes's trial convened on February 14, 1984. At the close of the government's evidence, Vignes moved for a finding of entrapment as a matter of law, which was denied. A-12. The court

also denied the defendant's request for jury instructions on the entrapment defense, to which the defendant objected. A-23.

The jury returned its verdict on February 17, 1984. At the defendant's request the jurors were polled, without any explanation of the purpose of polling or the polling procedure. The Court ordered the Clerk to "poll" the jurors. The Clerk asked each juror, "Is this your verdict?" After the jury had been excused, several jurors contacted the trial judge and defense counsel in order to state that the sentence rendered was not their own respective personal decision, but rather the result of pressure and intimidation. The jurors confessed a lack of understanding of what they were being asked when polled. The defendant subsequently argued a motion to set aside the verdict

and/or declare a mistrial based on the jurors' misunderstanding of the polling procedure, the motion was denied on May 22, 1984. A-6.

All of the arguments made before this Court were raised before the Supreme Court of Virginia. A-29.

ARGUMENT

I. THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE OUTRAGEOUS CONDUCT OF THE GOVERNMENT AND BY THE COURT'S REFUSAL TO PERMIT THE DEFENDANT TO USE AN ENTRAPMENT DEFENSE.

A. THE TRIAL COURT'S CLEARLY ERRONEOUS RULING ON THE DEFENDANT'S ENTRAPMENT DEFENSE DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW.

This Court has repeatedly reaffirmed the rule that under certain circumstances, the defense of entrapment may entitle a defendant to be acquitted of a crime even where he has in fact committed the act which constituted the crime. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). As defined by this Court, entrapment occurs "when the criminal design originates

with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells v. United States, supra, 287 U.S. at 442. The foundation for the federal entrapment defense was initially determined to rest in the implied intent of Congress not to have its statutes enforced by tempting innocent persons into violations, id.; Sherman v. United States, supra, 356 U.S. at 372, and a majority of this Court has since stated in dictum that entrapment is not a constitutional defense. United States v. Russell, supra, 411 U.S. at 433.

The Court has, however, indicated that in certain circumstances the conduct of law enforcement agents may be so outrageous that due process principles would bar convic-

tion. Id. at 431-32. Although not faced with such a case in the past, the Court has noted that in cases where governmental conduct violates "fundamental fairness," convictions obtained in reliance on such conduct would violate the due process clause of the fourteenth amendment, even where entrapment was not shown. Id. at 432.

This case presents an issue which is novel to this Court yet controlled directly by established precedent. The compelling facts of this case are very distinguishable from the facts involved in recent Court decisions on entrapment, and the rulings in these recent cases do not lend sufficient guidance to protect the due process rights of the defendant in this case and others who are similarly situated. More specifically, it appears that this Court has not yet directly

recognized that the due process clause protects an innocent person from governmental activity which is calculated to induce that innocent person into committing a crime which he had no predisposition to commit.

The controversies over the entrapment defense which have previously been before this Court involved either the test by which entrapment is to be found (subjective or objective), Sorrells v. United States, supra; Sherman v. United States, supra; United States v. Russell, supra; or whether a particular individual who was admittedly predisposed to commit the crime was nevertheless protected by the due process clause where governmental conduct was allegedly outrageous, United States v. Russell, supra; Hampton v. United States, supra. This case, on the other hand, gives the Court the opportunity to clarify the scope of due process

protections afforded to innocent and unpredisposed persons who are unwittingly induced and enticed by government agents into committing crimes solely for the purpose of obtaining arrests for those crimes.

The facts of this case demonstrate that the defendant, Paul Vignes, was first approached by a government agent named Gregory Dutcher at a charity affair for multiple sclerosis on October 22, 1982. There was uncontradicted evidence that prior to approaching him Dutcher had no credible evidence to believe that Vignes was involved in drugs. What followed after their initial meeting was a pattern of behavior on the part of the government agent designed solely to induce Vignes into engaging in criminal activity in which he had no previous intention to become involved. The facts show that

Vignes was susceptible to psychological pressures, and that Dutcher first befriended Vignes over a period of weeks and then repeatedly exerted undue influence on Vignes to procure drugs for him. Finally, out of a desire to please a new friend, and for no other reason, Vignes did eventually obtain, on three separate occasions within 4 weeks, less than 3 grams of cocaine for Dutcher as an accommodation. There is absolutely no credible evidence to indicate that Vignes ever obtained or sold cocaine to anyone other than the government agent.

The conviction from which this appeal arises involved the third of three transfers between Vignes and Dutcher.

At trial, Vignes admitted having obtained the cocaine for Dutcher and stated that he had not been predisposed to obtain the cocaine until Dutcher pressured him by

playing on his sympathies. However, the jury never was allowed to consider or rule on an entrapment defense because the court refused to allow the issue of entrapment to go to the jury.

Significantly, this ruling was based on an interpretation of law which was in direct conflict with established precedent of this Court. The trial court ruled that because the charge involved a third sale, a lack of predisposition could not be shown as a matter of law.

The trial transcript reveals that in arguing against an entrapment instruction, the prosecutor stated:

> I don't think there is a legal entrapment case in this, entrapment defense in this case. The reason for that is because we are dealing with the third of a series of transactions. I would say that conceivably one might argue entrapment with

> regard to the first distribution. But by the time we get to the third distribution that idea is in the Defendant's mind. . . . At that point nobody was placing an idea in his mind. Nothing more had happened at that point, than, by his testimony, the Defendant's own testimony, that the detective had come to him and said, "I'm going on a trip. I want something to, in effect, make my trip a livelier one." That's all that the detective said for that third transaction.
>
> And he then went out, got the cocaine and distributed it. There is no entrapment for the 18 November offense. So, I would object to the entrapment instruction.

A-23-24. Despite the defense attorney's argument that there was ample evidence to support the finding that "Mr. Vignes would not have done these things if not for the on-going inducement, on-going appeals to sympathy, the on-going holding out of friendship," A-25, the court found that there was no evidence on entrapment with regard to the November 18 1982 incident: "I don't recall any testimony

which would then give a justification for . . . any instruction on entrapment. Unless there is evidence of this, the giving of that instruction is clearly reversible error and certainly almost a dictate to the jury to tell the jury to go out and find someone not guilty." A-27. In finding that there was no evidence to give an instruction on entrapment, the court ignored all of the pre-November 18, 1982, relationship between Dutcher and Vignes.

In Sherman v. United States, supra, this court faced a nearly identical fact situation and found that entrapment had occurred as a matter of law. As in the present case, the defendant in Sherman had been befriended by a government agent who, through coercion and persistence, had convinced the defendant to procure drugs for him on three occasions. The issue of entrapment went to

the jury, which convicted the defendant. On appeal, this Court reversed, ruling that entrapment was established as a matter of law by the activities of the government agent. This Court found it to be significant that, as in the present case, there was no evidence that the defendant had been in the business of selling narcotics, no narcotics were found in the defendant's home, and there was no evidence that the defendant had made a profit on the transactions. Most importantly, this Court stated with regard to the issue of predisposition and inducement: "It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." 356 U.S. at 374 (emphasis

added).

This rule has been followed by all courts which have faced the issue. For example, in United States v. Timberlake, 559 F.2d 1375 (5th Cir. 1977), the issue was whether the judge erred in failing to charge the jury on entrapment at the close of the case. The instruction on entrapment was refused in part because of the court's belief that inducement activities two months prior to the particular sale were irrelevant with respect to the sale because of intervening sales. The court, citing Sherman v. United States, supra, held instead that "each contact was not a totally independent act. Consistently, they could each be part of a course of persuasive conduct by the government . . ." Id. at 1379, n.10. Thus, the court held:

> Once there is some evidence that the government induced the defendant to commit the

> crime, the question of entrapment becomes a factual one for the jury to decide. . . . In that situation the defendant is entitled to have his defensive theory of the case put before the jury with appropriate instructions from the trial judge. . . . "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence".
>
> . . . .

Id. at 1379; see also United States v. Brown, 544 F.2d 1155 (2d Cir. 1976) (requiring charge based on Sherman where course of conduct was involved); United States v. Anglada, 524 F.2d 296 (2d Cir. 1975) (the defense of entrapment deals with how the crime originates; there is no iron-clad rule that the reluctance that indicates a lack of propensity must continue throughout the transaction); Nordeste v. United States, 393 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S.

878 (1968) ("in considering the defense of entrapment, conduct of government agents prior to the transactions in question must also be taken into account"); United States v. Hill, 481 F. Supp. 558 (E.D. Pa. 1979), reversed on other grounds, 655 F.2d 512 (3d Cir.) cert. denied, 464 U.S. 1039 (1984) (whether later sales on which conviction was based were part of a course of conduct which was the product of the original inducement was a jury question); United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968) (sales made subsequent to an initial entrapment need not be independently induced); United States v. Campbell, 235 F. Supp. 190 (E.D. N.Y. 1964), (series of wagers were not evidence of a lack of entrapment on later wagers).

Therefore, the trial court's ruling in this case was clearly erroneous, and had

the effect of preventing the defendant from utilizing the entrapment defense in a situation in which this Court has found entrapment as a matter of law. Clearly, this denial of the jury instruction constituted a violation of fundamental due process rights. See Taylor v. Kentucky, 436 U.S. 478 (1978) (improper jury instruction can deny a defendant his right to a fair trial as guaranteed by the due process clause of the fourteenth amendment).

The courts are in agreement that in entrapment cases, submission of the issue to the jury is not required only

> if uncontradicted proof has established that the accused was "ready and willing without persuasion" and to have been "awaiting any propitious opportunity to commit the offense." . . . On the other hand, the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submis-

> sion to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be.

United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966) (emphasis added) (quoting United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952)). Moreover, in deciding whether a jury question is raised, the trial judge must consider the evidence in the light most favorable to the defendant. United States v. Riley, supra; United States v. Fleishman, 684 F.2d 1329 (9th Cir.), cert. denied, 103 S.Ct. 464 (1982) (only slight evidence needed to create a factual issue and get entrapment defense to the jury); United States v. Hodge, 539 F.2d 898 (6th Cir.), cert. denied, 429 U.S. 1091 (1976) (court erred in failing to submit evidence on the issue of entrapment to the jury where defendant introduced evidence that he was only responding to request of

friend).

It is apparent that the finding of a due process violation in the present case would be a logical extension of Supreme Court precedent. First, it is clear that the principles underlying the entrapment offense are rooted in the same principles underlying the fundamental fairness concept of due process. This Court has stated that entrapment is "the product of the creative activity of government officials." Sorrells v. United States, supra, 287 U.S. at 451. Thus,

> decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

Id. at 445 (quoting Newman v. United States, 299 F. 128 (4th Cir. 1924)). The Fifth Circuit has noted that "[t]his theory of defense to a criminal prosecution rests on the belief that 'no one should be convicted of a crime if he was either an innocent seduced by a government agent or one whose resistance was overcome.'" United States v. Timberlake, supra, 559 U.S. at 1378 (quoting Pierce v. United States, 414 F.2d 163, 165 (5th Cir.), cert. denied, 396 U.S. 960 (1969)). In other words, it simply is fundamentally unfair to manufacture crime by inducing otherwise innocent persons solely in order to make arrests.

As this Court has often noted, due process is not cast in a rigid mold; instead, it embodies a concept that has evolved historically. Rochin v. California, 342 U.S. 165, 168-72 (1952). It is neither fixed nor

final, and "is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1982). The essence of due process is an abiding sense of "fundamental fairness" in the relations between the government and its people. Id.

As discussed above, this Court has established that it recognizes that conduct by government officials in the course of pursuing admittedly predisposed individuals can violate due process. United States v. Russell, supra, 411 U.S. at 431-32. Following this rule, a number of federal appeals courts and state courts have found due process violations in the instigation of crimes by government agents. For example, in United

States v. Lard, 734 F.2d 1290, 1297 (8th Cir. 1984), the court found entrapment as a matter of law but additionally ruled that due process would also prevent the conviction of the defendant, who had no prior criminal record and committed the crime of making a pipe bomb only after several requests from a government agent. As the court stated:

> Concepts of fundamental fairness preclude us from putting our imprimatur on law enforcement overreaching conduct designed to instigate "a criminal act by persons 'otherwise innocent in order to lure them to its commission and to punish them.'" Russell, 411 U.S. at 428-29, 93 S.Ct. at 1641, quoting Sorrells v. United States, 287 U.S. at 448, 53 S.Ct. at 215.

Id. at 1297.

Similarly, this Court should now take this opportunity to make it clear that the due process clause does protect innocent

persons from being coerced by government agents into committing crime, even in circumstances where governmental conduct might not be deemed to be so outrageous as to constitute a due process violation against an admittedly predisposed defendant. In this case, the defendant never had the opportunity to prove that he was entrapped, and this Court should reverse the trial court's ruling and require an instruction on entrapment.

B. THE CONDUCT OF THE UNDERCOVER AGENT WAS OUTRAGEOUS, THUS VIOLATING THE DUE PROCESS RIGHTS OF THE DEFENDANT.

As discussed in the previous section of this petition, this Court and lower federal and state courts have recognized that even for defendants who are shown to be predisposed towards crime, due process requires that police officers adhere to certain standards of decency in investigating criminal

activity. It is more important to protect innocent persons from overreaching police activity than to protect admittedly predisposed persons from such conduct. Thus, in determining what constitutes outrageous conduct or fundamentally unfair police activity, it is appropriate to consider both the police conduct and the particular defendant involved. In other words, law enforcement conduct which is not "overzealous" when directed at admittedly predisposed defendants may in fact be violative of due process when directed at otherwise innocent persons. See United States v. Russell, supra, 411 U.S. at 429, 431-32.

It is clear that in the present case the conduct of detective Dutcher was overzealous and an affront to fundamental notions of due process and fair play. As discussed

above, Dutcher repeatedly played on the sympathies of the defendant and, without any credible evidence that Vignes was engaged in selling drugs or had any inclination toward any criminal activity, repeatedly requested that Vignes procure cocaine for him.

The case law supports a finding that a due process violation occurred in this case. United States v. Russell, supra, and Hampton v. United States, supra, both involved predisposed individuals and thus are distinguishable. More on point is United States v. Lard, supra, in which the court concentrated on the defendant's lack of predisposition in finding the government agent's conduct to be overzealous. An examination of the facts in Lard shows, the agent's conduct to be less offensive than in the present case. In Lard the agent simply asked Lard several times on one visit to engage in

criminal behavior, whereas in the present case Dutcher repeatedly requested Vignes over a period of weeks after socializing with him on numerous occasions. See also United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78 (1978); State ex rel. Paxton v. Johnson, 245 S.E.2d 843 (W. Va. 1978).

By evaluating the totality of the facts and circumstances, see United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982), the conduct of Dutcher with respect to the defendant Vignes was indeed overzealous and in violation of fundamental fairness required by the due process clause.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY FAILING TO ENFORCE THE PLEA AGREEMENT AND BY ALLOWING THE PROSECUTOR TO WITHDRAW HIS MOTION TO NOLLE PROSEQUI THE INDICTMENT.

This Court has long stated that plea agreements have an important place in the administration of criminal justice, and that the right to fairness in the bargaining process is based on due process. Santobello v. New York, 404 U.S. 257 (1971). In resolving issues involving the formation of such agreements, courts have looked simply at the analogous areas of contract law but also at whether the defendant has been treated fairly in his dealinges with the prosecutor. E.g., Cooper v. United States, 594 F.2d 12 (4th Cir. 1979).

In this case, the facts show that after the defendant and the prosecuttor entered into an unequivocable plea agreement,

the prosecutor reneged on the agreement. The sole basis for withdrawing from the commitment to nolle prosequi the indictment was the allegation by the prosecutor that he had been unaware that the defendant had filed an appeal in a companion case which had formed part of the original bargain. However, the uncontroverted evidence showed that a copy of the written notice of appeal was in the possession of the prosecutor at the time the bargain was made. Nevertheless, the trial court ruled, analogizing to contract principles, that no actual meeting of the minds had occurred, and thus the agreement need not be enforced.

This reliance on strict contract principles was clearly erroneous, for it completely ignored the constitutional need for fairness in dealing with a defendant.

Illustrative of the appropriate analysis of this issue is Cooper v. United States, supra. In Cooper, the prosecution proposed a plea agreement containing various benefits for the defendant, and after consulting with the defendant, the defendant's attorney telephoned the prosecutor to accept the agreement. At the outset of the conversation, however, the prosecutor notified the attorney that the offer had been withdrawn on orders of the prosecutor's superior. When the defendant moved to compel enforcement of the agreement, the court denied the motion and the defendant was later convicted.

In reversing the conviction, the court of appeals stated:

> While we agree that within classic contract doctrine the defendant here could probably claim no right and hence show no violation, we nonetheless conclude that right and viola-

> tion of right was shown, and that relief must be given. This, of course, means that we find the constitutional right to "fairness" to be wider in scope than that defined by the law of contract.

594 F.2d at 16-17 (footnote omitted). Thus, the court squarely held that:

> [U]nder appropriate circumstances--which we find here--a constitutional right to enforcement of plea proposals may arise before any technical "contract" has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.

Id. at 18 (foonote omitted). Thus, even though the defendant had technically not accepted under contract principles, the court nevertheless found that the agreement was enforceable.

Significantly, the court rejected the prosecutor's argument that misinformation or a lack of communication of some sort could

form the basis for a legitimate withdrawal from an agreement once it had been made, noting that "constitutional fairness" requires enforcement of agreements unless extenuating circumstances "that were unknown to and not reasonably discoverable by the government when the proposal was made have supervened or become known." Id. at 19 (emphasis added). In the present case, the fact that an appeal had been noted in a companion case was documented and in the prosecutor's case file and there was uncontested testimony that the prosecutor had not reviewed his case file. Clearly, this is an instance where the burden lies on the prosecutor's office "to keep the left hand informed of the right's doing." Cooper v. United States, supra, 594 F.2d at 20. See also United States v. Carrillo, 709 F.2d 35 (9th Cir.

1983); United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982); United States v. Carter, 454 F.2d 426 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974).

This Court's decision in Mabry v. Johnson, 104 S. Ct. 2543 (1984), is not at all inconsistent with a finding that the agreement in the present case should be enforced. Mabry is distinguishable from the present case by the fact that the defendant had voluntarily entered into another plea agreement subsequent to the prior agreement from which the prosecution had withdrawn. In the present case, on the other hand, the defendant did not enter into any subsequent agreements and was convicted at trial. Thus, the decision in Mabry, which rested on the inability of the defendant to attack the government's withdrawal from the first agreement because of the subsequent voluntary

agreement, id. at 2548, has no bearing on this case.

Clearly, under the applicable case law and constitutional provisions, the defendant was entitled to enforcement of the agreement to nolle prosequi the charges. Therefore, this Court should rule that the agreement should have been enforced. See Cooper v. United States, supra, 594 F.2d at 20-21.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FOURTEENTH AND SIXTH AMENDMENT BY FAILING TO INSTRUCT THE JURY ON THE NATURE OF THE JURY POLLING PROCEDURE.

Unlike the great majority of states, in Virginia juries determine whether the accused is guilty or not guilty and if the jury finds the accused guilty it fixes the punishment. V.C.A. § 19.2-295. Thus, the

jury's responsibility in Virginia is very great, and trial judges must be vigilant to insure that jury verdicts are rendered in accordance with due process and the sixth amendment to the United States Constitution.

One procedure which has developed in Virginia and elsewhere to ensure fair verdicts is the procedure of polling of the jury subsequent to the rendering of a verdict and sentence. The purpose of polling the jury is no less than to make certain that jury verdicts (and sentences) are unanimous and uncoerced. United States v. Mathis, 535 F.2d 1303 (D.C. Cir. 1976). It has long been established that jury polling is to be regarded as a matter of right. Clark v. Commonwealth, 135 Va. 490, 115 S.E. 508 (1923).

In the present case, the fifth and

sixth amendment rights of the defendant were violated because of the failure of the trial judge to explain to the jury what was occurring when the jury was being polled. Because of the special responsibility of the jury to fix a sentence in Virginia, a procedure which might be sufficient in other states proved to be confusing and constitutionally insufficient at the defendant's trial. Specifically, the failure of the court to explain the purpose of jury polling and explain exactly what was being asked of each juror led to misunderstanding and confusion on the part of jurors and an erroneous sentence.

The evidence shows that prior to being polled, the jurors had no knowledge that they would be polled or that the polling was to determine their individual choices. Moreover, some jurors clearly thought that they would be polled twice, once to determine

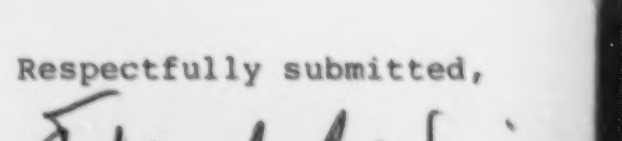
unanimity of the verdict and once to determine unanimity of the sentence.

It is well established that the conduct of a trial court in receiving a jury verdict can be so prejudicial as to deny a defendant due process of law. Jones v. Estelle, 538 F.2d 651 (5th Cir. 1976). In this case the defendant's constitutional rights were violated by the court's failure to conduct the polling procedure in a manner to insure fairness in reaching a verdict and sentence. If the polling procedure is to be meaningful, the questions asked of jurors upon being polled must be clear and free from ambiguity. Especially in Virginia, where jurors may agree on a verdict but disagree on a sentence, the court must poll the jury in a manner which is clear and unambiguous.

CONCLUSION

For the foregoing reasons, the petitioner, Paul H. Vignes, respectfully requests this Court to grant this petition and issue a writ of certiorari to the Supreme Court of Virginia.

Respectfully submitted,



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Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-957

. NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PAUL H. VIGNES,
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondents

WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

APPENDIX

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COMMONWEALTH OF VIRGINIA

VS .C-20860-61

PAUL VIGNES

THE 5th day of December, 1983 came the Commonwealth of Virginia, by its Attorney, Arthur Karp, the Defendant pursuant to his recognizance and his Attorneys, Edward Weiner and Peter Greenspun.

WHEREUPON this case came to be heard on the Commonwealth's "Motion to withdraw its prior Motion to Nolle Prosequi" and argument of counsel was had on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the aforesaid motion should be and it hereby is granted; and the Court so ordered that the prior Nolle Prosequi be set aside.

THEREUPON the Court Ordered that the case of Commonwealth of Virginia vs. Paul Vignes C-20861 be continued to February 14,

1984 for trial by Jury and the case of Commonwealth of Virginia vs Paul Vignes C-20860 be continued to February 27, 1984 for trial by Jury.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 12th day of December, 1983.

/s/ Paul Brown
Judge

COMMONWEALTH OF VIRGINIA

VS . C-20861

PAUL HENRI VIGNES

THE 17th day of February, 1984 came the Commonwealth of Virginia, by its Attorney, Arthur Karp, the Defendant pursuant to his recognizance and his Retained Attorneys, Edward Weiner and Kenneth Weiner.

WHEREUPON the Jury was polled as to their attendance on this date.

THEREUPON the jury returned to its room to resume its deliberation and after a time presented a question to which the Court responded and after a further period returned into Court and presented the following verdict, to-wit:

C-20861

We, the jury, find the Defendant "Guilty" of "Distribution of Cocaine as an Accomodation" as charged in the indictment herein and fix his punishment at <u>two</u>

and one-half years in prison

February 17, 1984 Donald Clarke
Date Foreman

WHEREUPON, on motion of the Defendant, the Jury was polled and each member thereof answered affirmatively as to the foregoing being their verdict.

THEREUPON the Jury was discharged.

THEREUPON the Defendant moved the Court to refer this case to the Probation Officer for the Circuit Court of Arlington County, Virginia, for investigation and report prior to the imposition of sentence, which said motion the Court granted and accordingly ordered said reference.

IT IS FURTHER ORDERED by the court that this case be continued to April 12, 1984 at 9:30 A.M. for the filing of the aforesaid report and the imposition of sentence.

IT IS ORDERED by the Court that the

appearance bond of the Defendant be revoked and the surety thereon released from further liability thereunder and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

AND the Defendant is hereby remanded to jail. Entered This 8th day of March, 1984.

/s/ Thomas R. Monroe
Judge

COMMONWEALTH OF VIRGINIA

VS C-20861

PAUL HENRI VIGNES

THE 22nd day of May, 1984 came the Commonwealth of Virginia, by its Attorney, Arthur Karp, the Probation Officer for the Circuit Court of Arlington County, Virginia, the Defendant in custody of the Sheriff and his Retained Attorney, Edward Weiner.

WHEREUPON this case came to be heard on the Defendant's motion to set aside the verdict reached by the jury herein on February 17, 1984 and argument of counsel was had on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the said motion should be and it hereby is denied.

THEREUPON the Attorney for the Defendant was asked if he had received and read a copy of the report and further if he had

explained the report to the Defendant, to all of which questions the Attorney for the Defendant replied in the affirmative.

WHEREUPON the Attorney for the Defendant was asked if he desired to have the Probation Officer or any other witnesses sworn to testify regarding the matter before the Court, to which the Attorney for the Defendant replied in the affirmative.

THEREUPON the Court ordered that the report of the Probation Officer be filed as a part of the record in this case after certain discrepancies were noted therein, as are more specifically set forth in the stenographic record of this case, and the Defendant cross-examined the investigating officers and other witnesses who were duly sworn as the law directs immediately prior thereto.

AND IT BEING DEMANDED of the accused

if he desired to make a statement or to advance any reason why judgment should not be pronounced against him according to law, both he and his counsel made statements to the Court.

THEREUPON the Court, taking into consideration said statement and all of the evidence in the case, the report of the said Probation Officer and argument of counsel, doth ascertain and fix the punishment of the accused to be confinement in the Penitentiary of this Commonwealth for a period of two and one half ($2\frac{1}{2}$) years and payment of the costs of these proceedings.

IT IS ACCORDINGLY the Judgment of this Court, pursuant to the verdict of the jury, that the said Paul Henri Vignes be and he hereby is sentenced to confinement in the Penitentiary of this Commonwealth for the term of two and one-half ($2\frac{1}{2}$) years, the

period by the Court ascertained as aforesaid and that the Commonwealth of Virginia do recover against the said Paul Henri Vignes its costs by it about its prosecution in this behalf expended.

WHEREUPON the defendant, after conferring with his attorney, moved the Court to stay execution of the sentence in this case, which said motion the Court granted, the Commonwealth of Virginia, by its Attorney, having no objection thereto.

IT IS THEREFORE ORDERED by the Court that execution of the sentence in this case be and the same hereby is stayed until May 25, 1984 at 6:00 P.M.

BE IT REMEMBERED that the defendant and his attorney indicated their intention to appeal this case to the Supreme Court of Virginia.

IT IS FURTHER ORDERED that the bond in this case be and it hereby is continued to May 25, 1984 at 6:00 P.M.

IT IS FURTHER ORDERED by the Court that as soon as possible after the termination of the stay of execution of sentence, the defendant be removed and safely conveyed according to law from the jail of this Court to the Penitentiary of this Commonwealth, therein to be kept, confined and treated in the manner provided by law.

THE COURT ORDERS that the Defendant be allowed credit for the time spent in jail awaiting trial, namely March 22, 1983 (one day only) and February 17, 1984 thru March 22, 1984.

THE COURT CERTIFIES that at all times during the trial of this case, the accused was personally present.

THE birth date of the Defendant is

reported to be April 14, 1951.

BE IT REMEMBERED that the offense date herein was on or about November 18, 1982.

IT IS FURTHER ORDERED by the Court that bond for appeal be set at $8000.00 and that the Defendant is given until 6:00 P.M. Friday May 25, 1984 to perfect the aforesaid bond.

Entered this 4th day of June 1984.

/s/ Thomas R. Monroe
Judge

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 3rd day of June, 1985.

Paul Henri Vignes, Appellant,

against Record No. 841500
Circuit Court No. C-20861

Commonwealth of Virginia, Appellee.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the

judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 6th day of September, 1985.

Paul Henri Vignes, Appellant,

against Record No. 841500
Circuit Court No. C-20861

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 3rd day of June, 1985, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA)

vs.)CRIMINAL NOS. 20860
20861

PAUL H. VIGNES,)

Defendant)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT MISCONDUCT

III. CONCLUSION

Considering the totality of circumstances, the conduct of the government agent can only be considered so outrageous so that due process principles prevent the prosecution of the Defendant.

A crime would not have occurred but for the misconduct of the police in creatig the crime and soliciting the Defendant's participation by appealing to Defendant's sympathy to commit an unlawful act. Such

inducement of an innocent person must be considered repugnant to the public's sense of fairness. For these reasons the indictment against the Defendant should be dismissed.

Respectfully submitted,

PAUL H. VIGNES
By Counsel

May 16, 1983

Kenneth E. Melson, Esquire
Deputy Assistant Commonwealth Attorney
Arlington County Courthouse
Arlington, Virginia 22201

Re: Commonwealth of Virginia v. Paul H. Vignes (Arlington)
Criminal Nos. 20860, 20861
~~Commonwealth of Virginia v. Paul H. Vignes (Fairfax)~~

Dear Mr. Melson:

Pursuant to our telephone conversation of May 16, 1983 it is our understanding and the understanding of our client that the Arlington County Commonwealth Attorneys Office agrees to nolle prosse the above captioned (Arlington) charges against Paul H. Vignes ~~and have the pending Fairfax County charge amended to Distribution of Cocaine as an Accomodation, a Class 5 Felony, to which he will plead guilty~~, upon the following terms and conditions:

Kenneth E. Melson, Esquire
Deputy Assistant Commonwealth Attorney
May 16, 1983
Page Two

1. Paul H. Vignes will not contest the forfeiture of his automobile;

2. Paul H. Vignes will reimburse the appropriate government agency in the amount of $400.00 representing monies expended for the purchase of controlled substances;

3. Paul H. Vignes will testify truly and accurately as to his identification of a certain individual he has previously identified and an automobile he has previously identified regarding an armed robbery in Arlington County.

This is the understanding to which we agree.

SEEN & AGREED:

/s/
Kenneth R. Weiner
Counsel for Paul H. Vignes

SEEN & AGREED:

/s/
Kenneth E. Melson

/s/
Edward L. Weiner
Counsel for Paul H. Vignes

/s/
David S. Cayer

Dec. 5, 1983

MR. GREENSPUN: Your Honor, essentially there is one key case I'd like to proffer to the Court which looks to this issue, and that is Cooper versus United States.

MR. GREENSPUN: I submit there was an agreement and a meeting of the minds in this matter. It may not follow strict contractual law, but Cooper says it does not follow strict contractual law because you get the areas of fundamental fairness. And I think and believe there was an agreement and it should be followed.

. . . .

MR. WEINER: There is a motion in the Court's file, in Mr. Karp's file about, that I had asked that this trial of Mr. Vignes be continued because of the pending appeal in

Fairfax. Your Honor heard that motion and denied it. I know, as an absolute certainty, two other members of the Commonwealth's Attorney's Office knew of the continuance. And I am, I feel fairly confident that a third member, an Assistant Commonwealth, knew of the continuance.

MR. KARP: Now, with regard to my knowledge -- now, I did not check the file and if Your Honor notices, takes a look at the file, there are, you will see there are a number of motions in there.

THE COURT: I find as a fact that the Commonwealth was misled as to a material point. I don't have to find it was consciously done, but they were misled. Therefore, any agreement was not a meeting of the minds on the material points.

February 16, 1984

The Court: The Motion to Strike the Evidence with reference to the theory of entrapment as argued by the Defendant is overruled or denied.

Instructions, gentlemen?

MR. EDWARD WEINER: Your Honor would note my objection to that.

February 16, 1984

MR. KARP: Your Honor, with regard to Defendant's Instruction A, my position on this is essentially the position stated at the time of the Motion to Strike. I don't think there is a legal entrapment case in this, entrapment defense in this case. The reason for that is because we are dealing with the third of a series of transactions. One might argue--For purposes of this discussion, I would say that conceivably one might argue entrapment with regard to the first distribution. But by the time we get to the third distribution that idea is in the Defendant's mind. He, in fact, is making the telephone call, and the words that were testified to are very important here -- the words were, in effect, "I have it. Do you still want the toot." At that point nobody

was placing an idea in his mind. Nothing more had happened at that point, than, by his own testimony, the Defendant's own testimony, that the detective had come to him and said, "I'm going on a trip. I want something to, in effect, make my trip a livelier one." That's all that the detective said for that third transaction.

And he then went out, got the cocaine and distributed it. There is no entrapment for the 18 November offense. So, I would object to the entrapment instruction.

MR. EDWARD WEINER: Your Honor, the law of entrapment says that once the Defendant puts forth some evidence of inducement by the Government that then the entrapment issue is in fact founded. The investigator himself says he used the story about the sick father in New York; he used those appeals on several times, so many he

says he can't remember. And within those three sales he said he met with the Defendant anywhere from six to ten times. Each time, I submit, he made appeals to the friendship -- And, certainly, we have raised a question which, though Your Honor denied my motion to find entrapment as a matter of law, I think this question certainly must go before the jury, because they very reasonably could find that Mr. Vignes would not have done these things if not for the on-going inducement, on-going appeals to sympathy, the on-going holding out of friendship. There is no -- There is absolutely no evidence that this was done on the part-- on a commercial or business purpose that Mr. Vignes was really doing this and this was just another customer.

We heard in detail the story of the

lengths he went to do a friend a favor, going to one location, waiting, meeting someone, meeting them at another, getting in someone else's car. There is certainly a question whether or not he was ready, a ready participant to break the law without inducements. I think that's certainly a question that should go before this jury.

MR. KARP: The question of whether he was to break the law without inducements is not the issue before the Court; it's whether, for the third transaction, the idea was planted in his mind. The arguments that counsel gives with regard to the inducements, with regard to he did it as a friend, they go to the question of whether it was an accomodation; they do not go to the question of whether it was entrapment.

MR. EDWARD WEINER: Your Honor, I would submit it was an on-going appeal to

this man's emotions and on-going ploy and this question just go to the jury.

THE COURT: I've tested my memory as far as the testimony is concerned. I don't recall any testimony which would then give a justification for the giving of Instruction A or any instruction on entrapment. Unless there is evidence of this, the giving of that instruction is clearly reversible error and certainly almost a dictate to the jury to tell the jury to go out and find someone not guilty.

I'm going to come back to Instruction A, because I'm going to go further into the evidence and testimony in this case.

THE COURT: Instruction A is refused. The Court does not see any evidence of entrapment.

MR. KENNETH WEINER: Note our

objection to that, Your Honor.

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO.

PAUL H. VIGNES,

Petitioner

vs.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR APPEAL

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October 2, 1984

Of Counsel:

Ronald J. Bacigal

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